Filed 9/21/06 R.H. v. Sup. Ct. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

R.H.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

No. B192104

(Los Angeles County Super. Ct. No. CK60434)

ORIGINAL PROCEEDINGS; petitions for extraordinary writ. Daniel Zeke Zeidler, Judge. Petitions granted.

R.H., in pro. per., and Elizabeth Hong for Petitioner.

No appearance for Respondent.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and O. Raquel Ramirez, Deputy County Counsel, for Real Party in Interest.

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R.H. (Father), the alleged father of N.H. (born in July 2005), seeks to reverse a June 1, 2006 order in which the juvenile court denied his Welfare and Institutions Code section 388 petition and in which the court set a permanent plan hearing for November 2, 2006. Because our opinion filed on June 26, 2006, reversed a November 17, 2005 order denying Father presumed father status and reunification services and directed the juvenile court to revisit those issues, we grant that part of Father's petitions challenging the setting of the permanent plan hearing.

BACKGROUND[1]

At the time of N.H.'s birth in July 2005, his mother, N.S. (Mother), who had a seven-year history of intermittent drug use, tested positive for PCP, cocaine, and marijuana. On August 31, 2005, N.H. was detained and placed with the maternal grandmother, where he remains.

Father, who has a history of felony convictions, lived with Mother during her pregnancy and wanted to have the child, but in February 2005, when Mother was four months pregnant, Father was arrested for auto theft and ultimately convicted and sentenced to prison. His expected release date is in March 2007. From prison, Father wrote about 25 letters to Mother, 15 letters to the grandmother, and, after he was contacted by the Department of Children and Family Services (DCFS), he wrote three letters to DCFS. Father's letters asked about the welfare of Mother and the baby. Father, who got along with the grandmother, first learned around October 2005 that N.H. was

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[1] We grant Father's request to take judicial notice of the record, briefs, and opinion in *In re N.H.* (June 26, 2006, B187840), Father's prior appeal from the dispositional order and an order denying him presumed father status. In that nonpublished opinion, we reversed the November 17, 2005 order denying Father presumed father status and reunification services and remanded the matter for further proceedings. But we rejected Father's challenges to the jurisdictional and dispositional orders, affirming those orders.

We take the background statement of facts and proceedings up to November 2005 mostly from the prior nonpublished opinion.

detained. Father was willing for the grandmother to care for N.H. until he was released from prison. While in prison, Father was enrolled in parenting and anger management classes.

On September 6, 2005, a petition was filed, and as later sustained, alleged that N.H. came within the jurisdiction of the juvenile court under Welfare and Institutions Code section 300, subdivision (b) (failure to protect),[2] based on Mother's history of drug abuse and use of drugs during her pregnancy with N.H. The petition listed the child's father as "identity unknown," but in a place on the form to list others with a relationship to the child, DCFS listed Father's name, date of birth, and "Delano State Prison."

Mother submitted a signed paternity questionnaire stating that R.H. was the child's father and that Father was in prison. Although the court found that Father was an alleged father, Father was not present at the hearing and no attorney was appointed to represent Father at that time. But DCFS was ordered to verify that he was in state prison, and if so, Father was to receive correspondence and appropriate telephone contact. DCFS was to prepare a jail removal order for Father for the jurisdictional and dispositional hearing on October 11, 2005. The juvenile court ordered reunification services for "minor and parents or guardians."

In a letter dated October 9, 2005, Father wrote to the juvenile court that he believed he was N.H.'s biological father, that he wanted custody of his son upon his release from prison, and that he was enrolled in a parenting class in prison and was willing to do whatever was necessary to gain custody of his son.

The jurisdiction/disposition report stated that the social worker spoke with Father on October 5, 2005. Father stated he was N.H.'s father. According to the maternal grandmother, Father held out the child as his own. Father told the social worker that he did not want the grandmother to adopt N.H. and that he planned to get custody of his child when he got out of prison. DCFS also reported that Mother, who was a transient,

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[2] Unspecified statutory references are to the Welfare and Institutions Code.

failed to comply with a voluntary placement agreement, failed to participate in a substance abuse program, and failed to keep DCFS informed of her whereabouts. But Mother "calls her child daily."

At the jurisdictional hearing on October 11, 2005, an attorney was appointed to represent Father, who waived his appearance for that date's hearing. The court stated, "The only count is on the Mother, any reason I can't proceed with jurisdictional issues?" Father's attorney did not respond, and the court proceeded to find that N.H. was a dependent pursuant to section 300, subdivision (b) and continued the disposition hearing to November 17, 2005.

Father's first court appearance was at the contested November 17 dispositional hearing. Father filed a signed Statement Regarding Paternity, requesting that the court enter a judgment of paternity. Father's attorney informed the juvenile court that Father wanted to be deemed N.H.'s presumed father. The court remarked: "The father is not a presumed father under Family Code section 7611. The father . . . is declared to be the father per the paternity form, that's still pretty much in the history of [*Adoption of Kelsey S*. (1992) 1 Cal.4th 816 (*Kelsey S*.)] [and] leaves him with some discretion to get reunification services but not certainly entitled to reunification services."[3]

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[3] In *Kelsey S*., the court held "that an unwed father who has no statutory right to block a third party adoption by withholding consent may nevertheless have a constitutional right to do so under the due process and equal protection clauses of the Fourteenth Amendment and thereby to preserve his opportunity to develop a parental relationship with his child. Under such circumstances, however, the unwed father's constitutional interest is merely inchoate [citation] and does not ripen into a constitutional right that he can assert to prevent adoption unless he proves that he has 'promptly come[] forward and demonstrate[d] a full commitment to his parental responsibilities . . . .'" (*Adoption of Michael H*. (1995) 10 Cal.4th 1043, 1052.)

Thus, a "biological father may be accorded parental rights and become a *Kelsey S*. father when his attempt to achieve presumed parent status under [Family Code] section 7611, subdivision (d) is thwarted by a third party and he made 'a full commitment to his parental responsibilities — emotional, financial, and otherwise.'" (*In re Elijah V*. (2005) 127 Cal.App.4th 576, 583.)

Father testified that after a 1996 drug conviction, he battled with drugs for two years but entered a program and had been sober for the last three years. He met Mother while he was attending Cocaine Anonymous meetings. Mother was not using drugs when he was living with her. While in prison, Father sent letters to two of his sisters to see if they would be willing to take custody of N.H. but had not received responses from them. His older sister informed his mother that she would not be able to care for N.H.

Father raised and supported four older children, ages 17, 15, 5 and 2. But he was not supporting them financially after he was incarcerated in February 2005. Father kept in touch with his other children and had unmonitored contact with them but had not visited with them after he was incarcerated. One of his children lived in Seattle, Washington. Father admitted that he was arrested for domestic violence against his former girlfriend, La Tanya Graham, and he was found in violation of probation because of the incident but that "she made the whole thing up . . . ." Graham appeared and testified that she brought domestic violence allegations against Father because they had an argument and she called the police to come and get Father. Graham told the police that Father had hit her but denied that it was true; she testified that the reason she told the police that Father had hit her was because she was mad and wanted Father to leave. But Graham admitted that Father did hit her on one occasion during one of their fights. Graham denied that her children were present during her arguments with Father.

Before the arguments of counsel, the juvenile court, in a tentative decision, stated: "[M]idway through the contest, I was inclined to give [Father] reunification services; the Mom is willing to get it any way. He's in programs. He is showing a deep interest in the child, at that point it was that he was doing parenting, anger management is non offending in the petition, maybe he could then make arrangements with a relative, but now with the information that has come out from the girlfriend and from him regarding the domestic violence and his lengthy criminal history and the information he won't have

any ability to form a relationship with this child for the next four months, my tentative is to deny him reunification services under [section 361.5, subdivision (e)(1)]."[4]

Father's attorney argued that Father wanted N.H. when Mother was pregnant with him, kept in touch with the child's family, and that N.H. "could only benefit from an opportunity to have both parents in his life." In colloquy with counsel, the juvenile court stated, "I misspoke, I said 361.5 (e)(1), but he's not a presumed father, so actually it's whether I would be exercising my discretion to give him reunification services . . . ."[5]

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[4] Section 361.5, subdivision (e)(1) provides in pertinent part: "If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered . . . . Reunification services are subject to the applicable time limitations imposed in subdivision (a). Services may include, but shall not be limited to, all of the following: [¶] (A) Maintaining contact between the parent and child through collect telephone calls. [¶] (B) Transportation services, where appropriate. [¶] (C) Visitation services, where appropriate. [¶] (D) Reasonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child."

Subdivision (a) of section 361.5 provides in pertinent part: "(2) For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under the age of three years, court-ordered services shall not exceed a period of six months from the date the child entered foster care. [¶] . . . [¶] Notwithstanding paragraphs (1), (2), and (3), court-ordered services may be extended up to a maximum time period not to exceed 18 months after the date the child was originally removed from physical custody of his or her parent or guardian if it can be shown, at the hearing held pursuant to subdivision (f) of Section 366.21, that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period. . . ."

[5] Section 361.5, subdivision (a) provides in pertinent part: "Upon a finding and declaration of paternity by the juvenile court or proof of a prior declaration of paternity by any court of competent jurisdiction, the juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child."

The attorney for N.H. argued that, given the age of the child, the provision of services to Father would be detrimental to the child. The child's attorney shared "the same concerns as the court regarding the domestic violence issues with his girlfriend."

The juvenile court removed N.H. from parental custody and placed his care and custody under DCFS supervision for suitable placement with the maternal grandmother. Mother and Father were afforded monitored visits, but Father was not afforded reunification services pursuant to section 361.5, subdivision (a). Mother's court-ordered case plan required her to participate in drug rehabilitation with random weekly testing, parent education, and individual counseling.

The juvenile court explained that "[a]lthough [Father] has expressed a commitment to the child, which I think is a good thing, it's not in the child's best interest to be — to be [subject to the] instability [of] waiting for the father to get out of prison for the next 16 months. In addition to the other factors that I already stated, the court is not exercising its discretion to grant the father reunification services. [¶] . . . [¶] . . . The [section 366.21, subdivision (e) six-month review] date is May 2nd of 2006. The [section 366.21, subdivision (f) 12-month review date] is November 2nd of 2006. The 18 month date is February 28th of 2007."

Father appealed from the dispositional order (judgment) and from the orders denying him presumed father status and reunification services.

On January 22, 2006, Father wrote a letter to the juvenile court asking for help in having him returned to his original prison facility, where he could continue with his parenting classes. The facility where he was housed after November 30, 2005, did not offer the classes he needed, and Father was concerned that he would have to start over.

According to a status report for a May 2, 2006 hearing, the maternal grandmother expressed an interest to DCFS in adopting N.H. if he was not returned to Mother's custody. Mother was not in contact with DCFS and had not enrolled in a drug treatment program, but was in sporadic contact with the child. DCFS recommended termination of Mother's reunification services and the setting of a permanent plan hearing. On May 2,

2006, the juvenile court continued the review hearing to June 1, 2006 because of lack of proper notice to Mother.

On June 1, 2006, neither parent appeared at the section 366.21, subdivision (e) hearing. Father, who waived his right to appear at the hearing, had written a March 24, 2006 letter to the juvenile court which Father wanted the court to consider in connection with the six-month review hearing.[6] Father wrote that his life of crime and drugs were behind him, that he understood that his imprisonment had a negative impact on N.H.'s life, that he was taking advantage of all that the state had to offer to rehabilitate himself, and that he intended to change his behavior and to become a loving father for N.H. Father also asserted that upon his release from prison in March 2007, his plan was to enter a sober living environment that accommodates adults with children; he also had a part-time job waiting for him upon his release. Father requested that the juvenile court reconsider its prior rulings and grant him presumed father status and reunification services.

On Father's behalf, his counsel filed on June 1, 2006, a section 388 petition, seeking to set aside the court's denial of reunification services. The petition alleged that there were changed circumstances because as of the end of May, Father had completed 8 of 10 parenting classes with positive participation, he consistently showed interest in reunifying with N.H., had kept in touch with DCFS, and was sincerely motivated to raise N.H.

Attached to a June 1, 2006 information for court officer was a progress letter written to the DCFS social worker by the manager of Father's parenting program in prison in which Father was reported to be "a participant with much respect, with many questions and with lots of helpful input for those who may be in a similar situation."

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[6] Father also explained that, because of racial tension and riots in the Los Angeles County jail, he feared for his safety and was withdrawing his request to appear at the May 2, 2006 hearing.

At the June 1, 2006 hearing, the juvenile court terminated Mother's reunification services, ordered DCFS to initiate an adoptive home study for the maternal grandmother, and set a section 366.26 hearing for November 2, 2006. The juvenile court also denied the request for a hearing on Father's section 388 petition, the minute order stating that "[t]he [section] 388 petition is considered and denied without a hearing. Fails to show how the requested modification will promote the best interest of the child. Early spring [prison release date] would be past [the] 18 month date and there is no indication of a plan for the kids while he is in custody."

According to the court clerk's certificate of mailing, a form for a notice of intent to file a writ petition was mailed to Father on June 5, 2006. The court received and filed Father's notice of intent on June 22, 2006, which notice of intent was signed and dated by Father on June 12, 2006. A portion of the form captioned "Notice" stated in pertinent part, "If you received this notice by mail only, the notice of intent must be filed within 17 days after the date that the clerk mailed the notification." Father, in propria persona, filed on July 10, 2006, a petition for extraordinary writ challenging the June 1, 2006 order. Father's counsel also filed a petition on Father's behalf on July 19, 2006.

DISCUSSION

The principal contention articulated in the petition drafted by Father's counsel is that "[t]he orders denying Father's section 388 petition and setting the section 366.26 hearing must be vacated, since [the appellate] court has reversed the trial court's orders denying Father presumed father status and reunification services."

Real party in interest did not file an answer to either petition, but moved to dismiss the July 10, 2006 petition on the ground that the notice of intent filed on June 22, 2006, was untimely because California Rules of Court, rule 38(e)(5) (rule 38) requires that the notice of intent be filed 12 days after the date the clerk mailed the notification; the instant notice of intent was filed 17 days after the clerk's mailing of notification. Although real party's motion addresses only the petition which Father filed in propria persona, there is only one notice of intent, which is the prerequisite for both petitions. We accordingly deem the following discussion to apply to both petitions.

Notwithstanding the 12-day time limit in rule 38 regarding the filing of the notice of intent to file a writ petition, the form mailed to Father inexplicably states that Father had 17 days within which to file the notice of intent. Father's notice of intent filed on June 22, 2006 did meet this provision. Paragraph (d) of rule 38 provides: ". . . The reviewing court may extend any time period, but must require an exceptional showing of good cause." The content of the notice on Father's form (allowing him 17 days to file the notice of intent) constitutes exceptionally good cause to relieve Father from the 12-day time requirement of rule 38. We therefore deny the motion to dismiss the petition on this ground.

Real party also contends that the July 10, 2006 petition for extraordinary writ should be dismissed as abandoned because it fails to contain citation to the record and points and authorities. But the July 10 petition alleges that supporting documents are not attached because of exigent circumstances, which we infer to be Father's incarceration and the unavailability of the record to Father before July 10. And the July 19, 2006 petition filed by Father's counsel does contain adequate record citations and points and authorities. Because real party fails to establish it would be prejudiced by allowing the July 10 petition to stand, we deny the motion to dismiss.

With respect to the merits of the petitions for extraordinary writ, we agree with Father's argument that the reversal of the November 17, 2005 order denying him reunification services and presumed father status requires the vacation of that part of the June 1, 2006 order setting a section 366.26 hearing. (See *Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149, 156 [reversal of order denying reunification services would result in reversal of order setting the section 366.26 hearing].)[7]

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[7] We do not intend to vacate any findings and orders made at the June 1, 2006 hearing (including orders under section 366.21, subdivision (e)) as to Mother, except for that part of the June 1, 2006 order setting the section 366.26 hearing. (See Cal. Rules of Court, rule 1460(i), which provides: "At the six-month review hearing, the court may not set a hearing under section 366.26 to consider termination of the rights of only one parent unless that parent is the only surviving parent, or the rights of the other parent have been
(footnote continued on next page)

Father's section 388 petition raised the same issues of presumed father status and reunification services which are to be addressed on remand from the prior appeal. Accordingly, the section 388 petition is moot. We thus deny Father relief with respect to the juvenile court's ruling on his section 388 petition.

Both petitions for extraordinary writ also request that the child be returned to Father's custody. This point appears to be a belated challenge to the dispositional order, which challenge we rejected in our opinion on Father's prior appeal. As the prior opinion is the law of the case on that point, the requests for custody are denied. (See fn. 1, *ante*.)

DISPOSITION

Real party in interest's motion to dismiss the petition is denied. R.H.'s request to take judicial notice is granted.

Let a peremptory writ of mandate issue directing the juvenile court to vacate that part of the June 1, 2006 order setting a Welfare and Institutions Code section 366.26 hearing.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

(footnote continued from previous page)

terminated by a California court of competent jurisdiction or by a court of competent jurisdiction of another state under the statutes of that state, or the other parent has relinquished custody of the child to the county welfare department.")

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.